

2020 ADVANCED DUI TRIAL ADVOCACY

August 31 – September 3, 2020
Phoenix, Arizona



Monday, August 31, 2020

APC Cases

Presented by:

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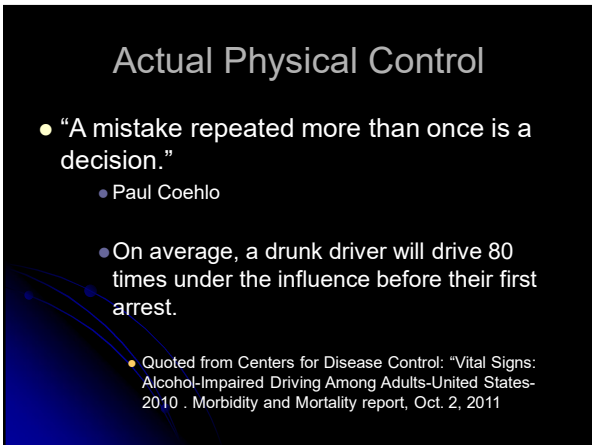
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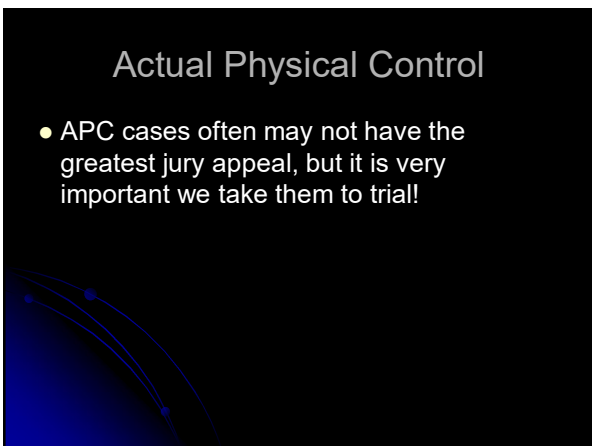
ELIZABETH BURTON ORTIZ
EXECUTIVE DIRECTOR



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ARS §§ 28-1381(A) & 28-1382

It is unlawful for anyone:

“to drive or be in actual physical control of a vehicle”

while impaired or above the “legal limit” within two hours of driving.

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DEFINITION OF DRIVING

- ARS § 28-101(17)

“Drive” means to operate or be in actual physical control of a motor vehicle.

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DOES DRIVING INCLUDE APC?

- One who drives a vehicle actually physically controls it.
- Driving is, therefore, a subset of actual physical control. APC is the broader category.

State v. Rivera, 207 Ariz. 69, 73, 83 P.3d 69, 73 (App. 2004).

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APC History

- For many years the Arizona Legislature limited Arizona's driving while intoxicated to actual driving. See Ariz. Code Ann. Section 66-402 (1939) and the case of State v. Ponce, 59 Ariz. 158, 161 (1942)

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History of APC

- Previous statute (1949) - "Any person who is under the influence of intoxicating liquor or narcotic drugs, or who is a habitual user of narcotic drugs, who shall drive any vehicle upon any highway within this state, shall be guilty of a misdemeanor,... (emphasis added)

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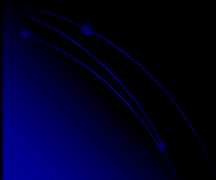
APC History

- In 1950, the Arizona Legislature extended the statute to prohibit "actual physical control" of a vehicle while under the influence of an intoxicating liquor. – 1950 Ariz. Sess. Laws ch. 3, section 54, codified in Ariz. Code Ann. Section 66-156. However, the legislature at that time did not define what is actual physical control.

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Actual Physical Control

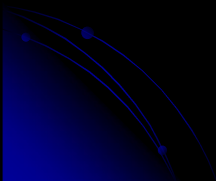
- 70 years later, what is the statutory definition of actual physical control?



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Trick Question

- Actual Physical Control is not defined by statute. It is solely a court created definition which changes over time.

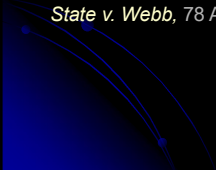


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History OF APC - *Webb*

- DUI Law
- First Arizona APC Case (1954)
- Statute applied to those who control a vehicle even if it is not in motion.

State v. Webb, 78 Ariz. 8, 274 P.2d 338 (1954).



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History of APC

- Later, the Courts tried to come up with it's own Black-Letter Law in 1983. *State v. Zavala*, 136 Ariz. 356, 666 P.2d 456 (1983)

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History *Zavala's* Black Letter Test

- 1) Vehicle must be off the traveled roadway. (one inch?)
- 2) The ignition must be off.

State v. Zavala, 136 Ariz. 356, 358, 666 P.2d 456, 458 (1983).

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APC

- How about if a vehicle was found all the way off the roadway by about 2 inches. It was 110 degrees outside and the vehicle was not running. However, the key was turned on enough to run the air conditioner. Meet the *Zavala* test?

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APC

- In 1995 the Courts had enough of those arguments and formulated a new test. Prosecutor's offices around the State strenuously objected. We were wrong.

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The End of "Safe Harbor"!

- A person may be convicted of APC "even when the vehicle is off the road with the engine not running."

Love, at 327, 897 P.2d at 629 (1995).

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LOVE'S TOTALITY APPROACH

"Totality of the circumstances" test.

State v. Love, 182 Ariz. 324, 897 P.2d 626 (1995).

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TOTALITY OF THE CIRCUMSTANCES



Fact finder determines “whether a driver voluntarily relinquished control and no longer presented a danger to himself or others.”

Love, at 327, 897 P.2d at 629.

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Love's Tests

- “[W]hether defendant was simply using the vehicle as a stationary shelter or actually posed a threat to the public by the exercise of present or imminent control over it while impaired.”
Love, at 326.
- “[W]hether a driver relinquished control and no longer presented a danger to himself or others.”
Love, at 327.

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APC

- Again note APC and driving often gets blurred at the same scene. APC can involve both discovered pulled over stationary vehicles plus vehicles found involved in an accident.

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Tips for Officer Training

- “Relinquished control” – Condition of the car. Was there an accident? Is there any vomit? Were they observed inside the car (even if just to take the keys out)?
- Found close to a damaged vehicle-Any other footprints at the scene? Chest injuries? Head injuries and windshield starring? Get cell phone records- did they call anyone? Did anyone else call from that location at that time? Who was the car registered to?

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Tips for Officers

- In cases involving accidents, the interview of the suspect at the scene plus a thorough police investigation and detailed police report are extremely important!
- As prosecutors- train your officers as to the *Love* listed factors and what to note at the scene.

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Love’s Test

- Many factors were listed in the *Love case*, making it wide open for a fact finders interpretation. The *Love* decision also leaves the door open for more if you have any.

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The Love Factors

- Whether the vehicle was running or the ignition was on.
- Where the key was located. (In the ignition, in their pocket, in the glovebox?)
- Where and in what position the driver was found in the vehicle .
- Whether the person was awake or asleep.
- If the vehicle's headlights were on.

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More Love Factors

- Where the vehicle was stopped (Does it matter anymore if it is on the roadway?)
- Whether the driver had voluntarily pulled off the road
- Time of day and weather conditions
- If the heater or air conditioner was on
- Whether the windows were up or down
- Any explanation of the circumstances advanced at trial

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Actual Physical Control?



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Actual Physical Control-Trial


- So what are the APC jury instructions?

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APC

- *State v. Zaragoza*, 221 Ariz. 49 (2009) – listed the instructions and reiterated strict liability for DUI/APC

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Actual Physical Control

In determining whether the defendant was in actual physical control of the vehicle, you should consider the totality of the circumstances shown by the evidence and whether the defendant's current or imminent control of the vehicle presented a real danger to [himself] [herself] or others at the time alleged. Factors to be considered might include, but are not limited to:

1. Whether the vehicle was running;
2. Whether the ignition was on;
3. Where the ignition key was located;
4. Where and in what position the driver was found in the vehicle;
5. Whether the person was awake or asleep;
6. Whether the vehicle's headlights were on;
7. Where the vehicle was stopped;
8. Whether the driver had voluntarily pulled off the road;
9. Time of day;
10. Weather conditions;
11. Whether the heater or air conditioner was on;
12. Whether the windows were up or down;
13. Any explanation of the circumstances shown by the evidence.

This list is not meant to be all-inclusive. It is up to you to examine all the available evidence and weigh its credibility in determining whether the defendant actually posed a threat to the public by the exercise of present or imminent control of the vehicle while impaired.

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Our Jury Panel when read!



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Actual Physical Control

- Scenario-Bob calls friend Tim to pick him up from the bar because he drank too much. Tim arrives and picks Bob up. While leaving the parking lot, Bob notices Tim doesn't see the pedestrian about to step off the curb. Bob grabs the wheel and jerks it to avoid hitting the pedestrian. Officer notices the jerking and pulls them over
- Is this enough for a DUI?

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APC CASES TO REMEMBER

Passenger grabs the wheel of a moving vehicle altering the vehicle's movement.

State v. Rivera, 207 Ariz. at 74, 83 P.3d at 74.

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APC Cases to Remember

- Scenario

- Officer comes across a car parked just off the traveled roadway. Officer approaches and notices a person in the drivers seat with the seat back sleeping. Car is off but the key is in the ignition. The officer knocks on the window. The person wakes up with a start and reaches for the key, turning it. The car does not turn over. Is this enough?

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APC Cases to Remember

Defendant attempts to start vehicle when officer wakes her.

Potter v. Ariz. DOT, 204 Ariz. 73, 59 P.3d 837 (App. 2002).

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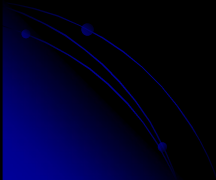
APC EXAMPLES INOPERABLE VEHICLE

- *State v. Larriva*, 178 Ariz. 64 (App. 1993). (Car was "high-centered" on a curb. Tow truck driver testified that no one could have pushed or driven the vehicle.)
- *But see, State v. Dawley (Barraza, RPI)*, 201 Ariz. 285 (App. 2001)(The facts from *Larriva* supported a conviction on the theory of circumstantial evidence of driving, not APC.)

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APC

- Do you have to elect APC or Driving for your trial?
- NO!

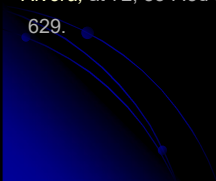


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ELECTION OF CHARGES

Driving or APC are just two ways of committing a single offense.

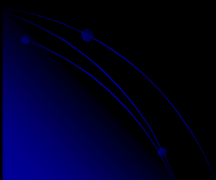
Rivera, at 72, 83 P.3d at 72; *Love*, at 328, 897 P.2d at 629.



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APC

- Does the car have to be drivable?



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INOPERABLE VEHICLE

- How about this one?



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INOPERABLE VEHICLE IF ON TOP?



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APC

- Remember the girl pushing the car photo? Her BAC is above the legal limit. What if she came to a downhill section of road while pushing it, got in the drivers seat and coasted down? Enough?

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INOPERABLE VEHICLE

- “[We] question whether the ability to ‘start’ a vehicle is necessarily dispositive of anything.” Dawley at 288, 34 P. 3d at 395
- See Dawley’s examples (defendant who pushed, coasted, steered and parked a car that did not run and a defendant that steered a vehicle.)

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Can Go Under DUI, APC, or Both

- Driving and APC are not mutually exclusive
- The jury does not have to agree on theory, only on a verdict. (Emphasis added)

State v. Rivera, supra.

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APC

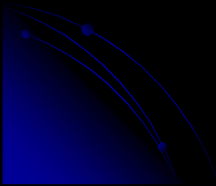
[E]ven if defendant relinquished control, evidence of driving while intoxicated will support guilty verdict

- *State v. Love*, 182 Ariz. 324, 327, 897 P.2d 626, 629.

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APC-Circumstantial Evid.

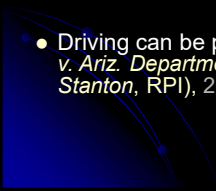
- Is circumstantial evidence enough for APC/Driving?



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CIRCUMSTANTIAL EVIDENCE
OF DRIVING

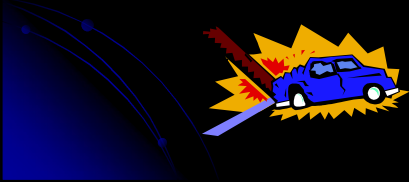
- Driving is a fact which can be proven by either direct or circumstantial evidence. *State ex rel. O'Neill v. Brown*, 182 Ariz. 525 (1995).
- Driving can be proven circumstantially. *Potter v. Ariz. Department of Transportation (Peters and Stanton, RPI)*, 204 Ariz. 73 (App. 2002).



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CIRCUMSTANTIAL EVIDENCE
OF DRIVING

The law makes no distinction between direct and circumstantial evidence. *State v. Stuard*, 176 Ariz. 589 (1993).



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APC-Intent

- Do we care if the defendant (or more likely friend) will testify the defendant did not intend to drive?

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Strict Liability

No! DUI/APC does not require proof of a culpable mental state. File a motion in limine.

State v. Parker, 136 Ariz. 474 (App. 1983); *State v. Williams*, 144 Ariz. 487 (1985); *State v. Superior Court (Cunningham, RPI)*, 184 Ariz. 409 (App. 1995).

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Strict Liability

"[N]o finding of 'intent to drive' must be made before a driver may be found to have actual physical control of the vehicle."

State v. Vermuele, 160 Ariz. 295 (App. 1980).

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Strict Liability

"We believe our supreme court in *Webb* and *Zavala* rejected a test which turns on the subjective intent of the driver. . ."

State v. Superior Court (Goseyun, RPI), 153 Ariz. 119, 735 P.2d 149 (1987).

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APC

- How about the case where the defendant is completely passed out behind the wheel?

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Strict Liability – unconscious defendant

Goseyun, and Webb supra. (defendant passed out behind the wheel)

Love, supra. (discusses a fact pattern in which a defendant left a party, entered his car, started the engine so the heater would keep him warm, and fell asleep.)



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Strict Liability

- You have a case where the defendant pulled completely off to the side of the road, threw up on the side of his car and was found by a patrolman sleeping ten minutes later. When asked why he was pulled off to the side he said he was feeling ill and had to throw up. Keys were in the ignition and the car was off.
- Is this enough?

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PRE-TRIAL MOTION TO DISMISS APC

Summary Judgment is Not Allowed in criminal cases.

State v. Rickhard-Hughes, 182 Ariz. 273, 895 P.2d 1036 (App. 1995).



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Summary judgment

"[I]n every case the trier of fact should be entitled to examine all available evidence and weigh credibility in determining [APC]"

Love, at 326, 897 P.2d at 628.

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Approaching an APC Case

- Determine what type of case you have (APC, Driving, Both)
- Review your charging language- add both?
- Consider *Voir Dire* questions and/or mini opening
- Propose jury instructions
- Remember the Two Hour Window
- Danger to him/herself or others
- Relinquishing control (voluntary?) – taking control

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Factors to Consider APC/Circumstantial Driving

- Initial observations of officer/witnesses
- Statements of the defendant. (*corpus*)
- Defendant's location
- Location of the vehicle
- Location of the keys
- Is the ignition running/car on
- Injuries consistent with driving or damage on vehicle?

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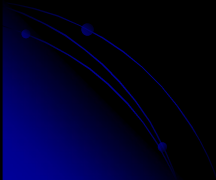
Factors to Consider APC/Circumstantial Driving

- How the car was driven (nature of wreck/bad driving, no driving)
- Vehicle ownership--if it helps
- The fact that Defendant took responsibility for the vehicle
- No one else connected to the vehicle
- Distance from crash to defendant's home and direction of travel
- The other *Love* factors

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APC

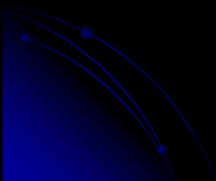
- So, If you have an APC case, just remember that you *Love* to deal in details.



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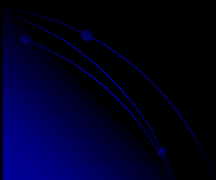
APC

- QUESTIONS?



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Thank You to GOHS and APAAC



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